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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1938

No. 8[redacted]28

CITIES SERVICE OIL COMPANY, *Petitioner*

vs.

B. P. DUNLAP, ET AL., *Respondents*

OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

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To the Honorable Supreme Court of the United States:

B. P. Dunlap, F. E. Rogers, W. H. Rogers, Mrs. L. J. Rogers, a widow, J. E. Rogers and wife, Ola Mae Rogers, Elvie (Rogers) Waskom and husband Azzie Waskom, Respondents in the above styled cause, desire to avail themselves of the privilege granted in Section 3 of Rule 38 of this Honorable Court to file herein forty printed copies of an opposing brief to the petition for certiorari; and to such end would respectfully show unto the Court:

Statement

Petitioner's Statement cannot be accepted as correct. Facts are assumed and legal principles announced on the assumed facts. The Circuit Court of Appeals makes a more accurate and satisfactory statement, which we adopt as a sufficient statement of the nature and result of the suit. (R. 330 and 392.) 100 Fed. (2d) 294; original opinion; 101 Fed. (2d) 314, on rehearing.

The petitioner, under the heading **"Reasons for allowance of Writ of Certiorari"** has enumerated eight reasons, but in the supporting brief advances five only which it deems to come within Supreme Court Rule 38, paragraph 5, effective February 27, 1939 (59 Sup. Ct. ix).

The first three of the five address themselves to the contention of petitioner that the Circuit Court of Appeals has disregarded the Texas cases announcing and following the common law doctrine that a conveyance of land bounded on a public highway carries with it the fee to the center of the road, etc.

Discussion of the First Three Points Urged by Petitioner

The Circuit Court of Appeals did not disregard the Texas cases at all. It held that the cases relied upon by petitioner were not in point on the facts of the case here. No case, Texas or otherwise, cited by petitioner, falls within the facts of the instant case.

Every case where the rule contended for by petitioner has been applied by the Texas courts is one of three kinds:

(1) The described tract actually margined a road;

(2) The metes and bounds description of the described tract call for a road, highway or street as a boundary; or

(3) The tract was purchased with reference to a map or plat showing it to be margined by a road, highway or street.

The facts here do not bring this case within any of said three classes of cases.

The Circuit Court of Appeals correctly disposed of the contention of petitioner in its opinion, by showing that the land of the petitioner, when confined to its metes and bounds calls, does not margin on any road; that no instrument in the chain of title has a call for a road, highway or street as a boundary of the tract; and that there is no map or plat showing it to be margined by a road, highway or street, with reference to which petitioner or anyone else purchased.

The Circuit Court of Appeals says [R. 330 (336), 100 Fed. (2d) 294 (297)]:

> "Appellant strongly argues that although it be established that the call for the Wiley Davis corner does not belong in the deed, under settled rules of law the conveying of the land adjoining a road will carry the grantor's title to the servient fee up to

the center of the road, and if the grantor has no land beyond the road the grantor's title to its further edge will pass. Such is the general rule applied both to highways and streets and alleys, nonnavigable streams and railroad rights-of-way. 8 Am. Jur., Boundaries, Sections 36, 39, 22, 25; 11 C. J. S., Boundaries, Section 31, 35, 45. It is based on the presumed intention of the parties that the grantor would not reserve a long, narrow strip under such way or stream for which he had no use, and partly on public policy in that such strips are likely to give rise to litigation in the distant future. But it is not unlawful to retain such a strip. If the intention to do so is clear, the contrary presumption must yield. And if the conveyance as made does not reach the highway or stream, it cannot be extended to it to avoid creating a separately owned strip. There was in 1899 no highway or street or alley covering the strip in question. A highway ran east and west through the land to be partitioned near its center. The Rogers brothers had run a sawmill on their land, and had hauled logs along the line of Davis to this highway. It was not a publicly worked way, or an established road. About this time, the date not being clearly fixed, Davis wished to confine the travel across his place, and he testified he gave fifteen feet along the east edge of his land for a north and south road. Several witnesses say they helped cut the road out fifteen or twenty feet wide, cutting the line trees on the Davis line because they were in the road. The big pine at the Wiley Davis northeast corner was cut close to the ground and its stump was in the middle of the road. It was thereafter a country road open to all, although little used. The fences, where there were any, on either side were sixty or seventy feet apart,

but not straight, and probably were not regarded as correct line fences. The land, as we understand, was mostly in woods. The actual road was thus only twenty feet wide, and supposed to be half on the land of Davis. Assuming it to have been in existence in 1899, the northwest and southwest corners which the surveyor fixed for Lot No. 2 were about sixty-six feet from the center of this road and fifty-six feet from its margin. Neither the deed nor the field notes say anything about a road. This is not a case in which a road is mentioned as a boundary, nor one in which the boundary fixed is in fact the edge of a road either public or private. The only thing that tends to make the strip in contest a road, or the equivalent of a road, is the parol evidence that the Rogers brothers during the survey informed the surveyor, as found by the Court, that 'They would leave the 66 feet out of the partition and use the same jointly, and keep it like it was; the same 66 foot tract was then being used *in part* as a logging road.' There was no covenant to dedicate the strip to the public as a road. It was subjected to no easement over the whole of it so as to convert the whole strip into a roadway. There is plainly expressed intention not to add the strip to Lot No. 2 but to retain joint control and ownership of it. Since the deed as prepared said nothing about a road as a boundary, there was no occasion to make a reservation of the land, though to some extent on its far edge it was used for a road. The case presented is not one requiring an extension of the deed beyond its true calls. In recent years a broad public road occupying most of the strip has been laid out, but this development years after the making of the deed cannot have the effect of extending its scope. 11 C. J. S., Boundaries, Sec. 35 (4)."

The petitioner contends that the Circuit Court of Appeals disregarded the Texas cases of Gulf Production Co. v. Warren, 99 S. W. (2d) 616, and Rio Bravo Oil Co. v. Weed, 121 Tex. 427, 50 S. W. (2d) 1080, on the question of the admission of the testimony of F. E. Rogers, in substance that the land in controversy was left out of the partition of 1899 intentionally.

The Circuit Court of Appeals [R. 330 (334); 100 Fed. (2d) 294 (296)] said:

> "In the effort to include just the land the parties intended, which is the true object in all questions of boundary, shall the measurement of 440 yards for the north line prevail, or shall the call for Wiley Davis' northeast corner control? The appellant correctly contends that there is a presumption that the parties intended to divide all their land and especially not to leave a narrow strip off to one side; and that it is a general rule that courses and distances, because of the greater possibility of error in them, will yield to a call for a fixed monument, including the line or corner of an adjoiner. Camp v. Gulf Production Co., 122 Tex. 383, 61 S. W. (2d) 773; Goodson v. Fitzgerald, Tex. Civ. App., 135 S. W. 696; 8 Am. Jur., Boundaries, Sections 51, 53, 56. But the presumption stated is rebuttable; and the rule not without exceptions. It sometimes appears that the measurements are more likely correct than the call for some monument or adjoiner, or that such call was inserted by error; and when that is clearly true the mistaken call will be rejected and the measurements followed even in cases at law. White v. Luning, 93 U. S. 514, 23 L. Ed. 938; State v. Sullivan, 127 Tex.

528, 92 S. W. (2d) 228; Wilson v. Giraud, 111 Tex. 253, 231 S. W. 1074; Caswell v. Faulk, Tex. Civ. App., 97 S. W. (2d) 341, error refused; Humble Oil Co. v. State, Tex. Civ. App., 104 S. W. (2d) 174, error refused; 8 Am. Jur., Boundaries, Sec. 52. In the present case the scope of the admissible evidence is enlarged by the pleaded issue that the reference to the Wiley Davis corner got into the deed through mistake. On that issue, the case being in equity, parol and other extrinsic evidence of what was done and said was plainly admissible. The Court properly heard the testimony of persons who were present at the survey, and it clearly showed that the northwest corner of Lot No. 2 was deliberately and purposely put about a chain's length east of the Wiley Davis corner so as to leave a strip undivided and under the control of all four tenants in common for the purpose of a road. The planting of the heavy gear shaft at the same distance from the Davis line at the south end powerfully sustains this testimony. Most evidently it marked a permanent corner. The evidence was admissible, and it well warranted the finding of the judge that the reference to the Wiley Davis corner as the corner of Lot No. 2 was inserted by mistake in drafting the deed. Appellant argues that the field notes of the survey contradict the witnesses as to where the surveyor went and how he located the corners of Lot No. 2. It so happens that the field notes of Lot No. 2 have not been found. Those for the other lots do not show the surveyor at or near the Wiley Davis corner, or measuring the north line 440 yards or any other length, for this line was not common to the other lots. Only the field notes for Lot No. 2 would show what was done at or near the northwest corner of that lot.

There is no contradiction of the witnesses by the field notes introduced."

The principles of law announced are based on the facts of the case as stated by the Circuit Court of Appeals as follows [R. 330 (382); 100 Fed. (2d) 294]:

"The first lease copied exactly the calls of the partition deed to J. F. Rogers, as follows: 'Being a part of the G. A. Thomas HR; starting at the N.E. corner of Lot No. 2, which is the N.W. corner of W. H. Rogers' tract, Lot No. 1, running West 440 yards to Wiley Davis' N.E. corner; thence south 880 yards; thence east 224 yards; thence north 310 yards at 12 deg. east of north; thence east 754 yards; to W. H. Rogers line, thence north 574 yards to the starting point; containing 68-1/5 acres more or less.' On its face, this survey is out of balance. The total west measurement is 440 yards. The east measurements are 224 and 574 yards, a total of 798 yards beside the easterly gain in the line which runs 310 yards 12 deg. east or north. All agree that the partition deeds, which are of the same date and between the same parties, recite the same consideration, and each in form a warranty deed to the grantee from the other tenants in common and duly recorded, are to be construed together as one transaction. Comparing them, it appears that the east and west line set down in the deed to J. F. Rogers as 754 yards long continues as a part of the south boundary of Lot No. 1 for 66 yards further. This entire line appears in the deed to the F. E. and J. W. Rogers part as 220 yards long, showing that 754 is a clerical error for 154, because 154 plus 66 makes 220 yards. Thus corrected, the J. F. Rogers east and west measurements ap-

proximately balance. They also work out correctly on the land. The northeast corner of the original tract is known, and is the northeast corner of Lot No. 1. The northwest corner of Lot No. 1 is by the deed to W. H. Rogers fixed 440 yards to the west, and was in 1930 a marked corner. That is the northeast corner of Lot No. 2, the J. F. Rogers tract, and the beginning and ending point for the calls in the deed to him. The northwest corner (ignoring the Wiley Davis corner) is called for as 440 yards to the west. Thence the course is south 880 chains (yards), the deed mentioning no marker there but there being at this point a heavy iron shaft with a beveled gear on it planted, as is testified, soon after the survey to mark the corner, and it has been reputed to be the corner ever since. The courses and distances following thence, after the correction of 754 to 154 yards, reach the west line of Lot No. 2 and proceed along it to the beginning with fair accuracy. On the other hand, if the north line of Lot No. 2 is not stopped at 440 yards but is continued about 66 feet to Wiley Davis' N.E. corner, which was a known point in 1899 and ever since, and if the survey is continued thence, the beveled gear shaft will be missed at the southwest corner by 66 feet, the west lines of Lot No. 1 will not be reached by that distance, nor will the beginning point be."*

So it is clear that the Circuit Court of Appeals did not erroneously disregard the cases cited by petitioner, but followed the Texas cases cited, of State v. Sullivan,

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*See appendix for testimony of petitioner's surveyors and explanation of the testimony as applied to maps used in the trial in the District Court.

127 Tex. 525, 92 S. W. (2d) 228; Wilson v. Giraud, 111 Tex. 253, 231 S. W. 1074; Caswell v. Faulk, 97 S. W. (2d) 341, error refused; Humble Oil Co. v. State, 104 S. W. (2d) 174, error refused. There are many more Texas cases to the same effect, such as **Blake v. Pure Oil Company**, 128 Tex. 536, 100 S. W. (2d) 1009, and **Beck v. Gulf Production Company**, 113 S. W. (2d) 258, error refused; **Gill v. Peterson**, 86 S. W. (2d) 629.

In the Beck case, it is said:

> "The field notes to block 5 and the other 8 blocks upon their face are unambiguous, but when they are applied upon the ground various ambiguities and inconsistencies appear. Under such circumstances parol evidence is admissible to show where on the ground the surveys were actually made. Gill v. Peterson, 126 Tex. 216, 86 S. W. (2d) 629; Blake v. Pure Oil Co., Tex. Com. App., 100 S. W. (2d) 1009."

Also typical is the language of the Court in **Blake v. Pure Oil Company**, 128 Tex. 536, 100 S. W. (2d) 1009, wherein it is said:

> "Parol evidence is admissible to show where on the ground a survey or a line of a survey was actually made, when the calls in the field notes or deed are conflicting or ambiguous, or when the effort to apply the description to the ground gives rise to ambiguity."

State v. Sullivan, 127 Tex. 525, 92 S. W. (2d) 228, is a controlling authority on the question, and there it is said:

"Where the facts conclusively show that the surveyor through mistake or by conjecture called for the adjoinder, the call for adjoinder does not control over course and distance, even though the line or corner called for was marked. In such situation the call for adjoinder will be rejected, as inserted by mistake, and controlling effect given to course and distance from known and undisputed corners, when under the facts of the particular case such construction of the survey is 'most consistent with the intention to be derived from the entire description.' This method of construction by the rejection of a call for adjoinder inserted by mistake is most consistent with the true intention if its effect is to harmonize the other terms of the field notes and to disregard as few of the calls as possible."

The Texas Court of Civil Appeals at Austin, in the recent case of **Humble Oil & Refining Company v. State**, 104 S. W. (2d) 174 (179), error refused, quoted the above language from **State v. Sullivan** (supra) with approval.

So, we take it that the Circuit Court of Appeals was clearly correct in its decision in holding the testimony of F. E. Rogers admissible.

Discussion of Point Four Urged by Petitioner

The petitioner contends that the Circuit Court of Appeals has refused to follow Texas cases with respect to the burden of proof on petitioner's plea of innocent purchaser, and that the decision of the Circuit Court of Appeals in this respect is directly contrary to the **Erie**

and Ruhlin cases. (Erie Railroad Co. v Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1187, 114 A. L. R. 1487; Ruhlin v. New York Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860, 82 L. Ed. 1290).

In the original opinion, R. 330, 100 Fed. (2d) 294 (297), the Circuit Court of Appeals disposes of this contention as follows:

> "But appellant argues that equity will not correct a mistake as against a bona fide purchaser for value without notice, and that there is no proof that it and its predecessors in the lease were not such. The answer is that there is no sufficient proof that they were. In the law of negotiable instruments presumptions are indulged as to bona fides and want of notice, but in equity a claim to the favored position of a bona fide purchaser for value without notice is a matter of affirmative defense, and he who asserts it has the burden of proving it. Compare United States v. California & Oregon Land Co., 148 U. S. 31, 13 S. Ct. 458, 37 L. Ed. 354. It fairly appears that these lessees paid value in developing the lease, but there is no evidence at all that at the time they paid they did not know that the west line was not the east line of Davis, or that the call for 440 yards on the north line would not reach Davis' corner, rendering the corner questionable. No well was drilled or expenditures made on this disputed strip. There being no proof of bona fides or want of notice, this plea was not sustained. The district judge held the evidence touching the intention of the parties to be admissible on the ground that the deed was ambiguous irrespective of the equitable power to cor-

rect a mistake in the deed. **The cases cited above go far to sustain him, but we find it unnecessary to determine that question in view of the equitable issues pleaded.**" (Emphasis ours.)

We are of opinion that the Texas cases are to the effect that the evidence touching the intention of the parties was admissible on the ground that the deed was ambiguous, particularly when, as here, it is shown that the calls in the field notes are conflicting or ambiguous, and where, as here, it is shown that when an effort is made to apply the description to the ground there arises an ambiguity. In these circumstances, the question of innocent purchaser was not in the case. And, of course, if that question was not necessary to the decision, the Circuit Court of Appeals, without doubt, has correctly decided the case. In that event, we need not consider whether or not Erie R. R. v. Tompkins (supra) has any application here.

The District Judge found that when the field notes of Lot 2 of the partition of 1899 were applied to the ground, an ambiguity was created. (R. 70.)

The Circuit Court of Appeals pointed out that the field notes, on their face, were out of balance; that when applied to the ground, if effect be given to the call for the Wiley Davis corner, the old bevel gear for the southwest corner will be missed by 66 feet; the west lines of Lot 1 will not be reached by 66 feet, and the beginning point of the survey will not be reached. In other words, the field notes of the survey will not close.

(Original opinion, 100 Fed. (2d) 294 (296).) (R. 330 (333)).

The district judge found (R. 69) that the surveyors of the Complainant (Petitioner) testified that there was an ambiguity in the partition deed and in the lease of the Complainant when it was attempted to be applied to the ground, and upon such finding made his conclusions of law (R. 69-70) in accordance with the conclusions announced by the Circuit Court of Appeals.

In these circumstances, the innocent purchaser issue was not in the case, and it was not necessary for the Circuit Court of Appeals to discuss the issue.

The only question before the Circuit Court of Appeals, necessary to its decision, was one of the construction of the calls of the deed and giving effect to the intention of the parties. **State v. Sullivan**, 127 Tex. 525, 92 S. W. (2d) 228; **Blake v. Pure Oil Company**, 128 Tex. 536, 100 S. W. (2d) 1009; **Humble Oil & Refining Co. v. State**, 1[illegible] S. W. (2d) 174 (179); **Beck v. Gulf Production Co.**, 113 S. W. (2d) 258 (261); **Gill v. Peterson**, 126 Tex. 236, 86 S. W. (2d) 629.

The trial court and the Circuit Court of Appeals but followed the Texas cases, and properly so; for, as said by the Texas Supreme Court, speaking through Judge Smedley of the Commission, in Gill v. Peterson, wherein he referred to the Texas Supreme Court case of Davis v. George, 102 Tex. 106 (110), 134 S. W. 326):

"It is to be observed, however, as held in the authority last cited, and in many others, that parol evidence is admissible to show where, on the ground a survey was actually made, when the calls in the field notes or deed are conflicting or ambiguous, or when the effort to apply the description to the ground gives rise to ambiguity. Hughes v. Sandal, 25 Tex. 162, 164; Thompson v. Langdon, 87 Tex. 254, 258, 28 S. W. 931, 935; Johnson v. Archibald, 78 Tex. 96, 102, 14 S. W. 266, 22 Am. St. Rep. 27; Wilson v. Giraud, 111 Tex. 253, 263, 231 S. W. 1074, 1078. The purpose of admitting the parol evidence under such circumstances 'is not to override that which is written, but to properly interpret it'."

However, if it be thought that the question of innocent purchaser was in the case, nevertheless the Circuit Court of Appeals correctly decided the issue. This is a case in equity, commenced by the petitioner by filing its bill in equity in the District Court for the Eastern District of Texas, Tyler Division. The Federal equity rules of 1912 were in effect when the bill was filed and were in effect when the case was tried. The Equity Rules have the force and effect of a Federal statute. The equity practice under the Equity Rules is the same in all the States of the Union. (28 U. S. C. A., Sec. 723, and cases cited under Note 12, page 44.)

In an equity case, it seems that the defense of innocent purchaser is an affirmative one, to be pleaded and proved by him who asserts it. **Boone v. Chiles**, 10 Pet. 177. The Circuit Court of Appeals quotes from this authority, in its opinion on rehearing, 101 Fed. (2d) 314

(315). **Boone v. Chiles** was cited and followed by the Supreme Court of the United States in Wright-Blodgett Company v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. 637, in an opinion written by the present Chief Justice. In that opinion, the then Mr. Justice Hughes, in speaking of the defense of innocent purchaser in an equity case, said: "But this is an affirmative defense which the grantee must establish in order to defeat the government's right to the cancellation of the conveyance which fraud alone is shown to have induced." He then quotes from **Boone v. Chiles** at length, citing numerous authorities (35 Sup. Ct. 339 (341).

The petitioner complains of the ruling of the Circuit Court of Appeals wherein it said that "the recital, moreover, according to the Federal cases above referred to, is no evidence at all of payment as against the defendants." (101 Fed. (2d) 314 (315). Not only is such recital no evidence at all of payment, as against the defendants, according to the Federal cases, but likewise is no evidence at all of payment as against these defendants under the Texas Supreme Court case of **Watkins v. Edwards**, 23 Tex. 443. This case cites with approval Boone v. Chiles, 10 Pet. 177 (211).

As said by the Circuit Court of Appeals (101 Fed. (2d) 316), the innocent purchaser question in this particular case, as made by the pleadings, was a matter of practice or procedure under the Federal Equity Rules in force at the time, and was not a matter of substantive

law, Mr. Pomeroy says that the doctrine of bona fide purchaser for value "is in no respect a rule of property but a rule of inaction." (Pom. Eq. Jur., Sec. 743.) We cannot improve upon Judge Sibley's language or reasoning, in his opinion on rehearing (101 Fed. (2d) 314).

Discussion of Point Five Urged by Petitioner

(Petition for Certiorari, page 18)

The petitioner urges that the Circuit Court of Appeals has decided an important question of general law in a way untenable, in that it says the effect of the decision is to grant a reformation of a deed executed in 1899 and a lease executed and recorded more than four years prior to filing of the suit.

The suit was not one for the reformation of the deed or for reformation of the lease.

Petitioner, itself, commenced the suit as a suit to cancel a lease of Dunlap as a cloud on its asserted title. Under the Texas cases, hereinbefore cited, the real questions in the case were (1) the construction of the deed of 1899—it being ambiguous on its face and when its calls were applied to the ground inconsistencies appear; and, (2) to ascertain the real intention of the parties in making the partition of 1899.

It is not a question of reformation of an instrument at all. **Humble Oil & Refining Company v. State**, 104 S. W. (2d) 174 (179); **Beck v. Gulf Production Com-**

pany, 113 S. W. (2d) 258 (261); State v. Sullivan, 127 Tex. 525, 92 S. W. (2d) 228; Blake v. Pure Oil Company, 128 Tex. 536, 100 S. W. (2d) 1009.

Petitioner cites and relies upon Art. 5529, Vernon's Rev. Civ. Stats., 1925, of Texas, said article of the Texas statutes providing that an action to reform a deed must be brought within four years after the cause of action accrues. If petitioner relies on the Texas statute of limitation, even if it were applicable here, another Texas statute would preclude it any relief. Vernon's Rev. Civ. Stats., 1925, Art. 5540:

> "The law of limitation shall not be available in any suit unless it be specifically set forth by the party who in his answer invokes it as a defense."

The petitioner did not plead limitation in its reply to defendants' answer and cross-bill, (R. 43), and not having pleaded the Texas statute now relied upon cannot have the benefit of it.

The question of equitable laches clearly is not in the case, for, as hereinbefore shown, the true question was the construction of the deed and the ascertainment of the intention of the parties, under the well-known rules applicable both in the courts of Texas and in the Federal Courts.

Beyond doubt, the Circuit Court of Appeals has correctly decided this case, and the petition for certiorari should be denied. THEREFORE,

It is respectfully prayed that the petition for writ of certiorari be denied.

By Angus G. Wynne

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OPPOSING BRIEF TO PETITION FOR WRIT OF CERTIORARI

Receipt of a copy of the Opposing Brief to Petition for Certiorari is hereby acknowledged, and further notice of the filing and presentation of such brief is waived.

.....

DAVID B. TRAMMELL,
Attorney for Petitioner.

APPENDIX

Appellant's surveyor Baker, in his testimony with reference to his survey and in connection with his explanation of his map, Exhibit 14 (R. 294), clearly shows the ambiguity. For the convenience of the Court, we here insert a photostat of the pertinent portions of said map, showing Baker's own explanation which shows the strip at the southeast (shaded) along the line north 12 deg. east 310 yards, as called for in the deeds of 1899 and the lease of Oct. 30, 1930, if the call for the Wiley Davis northeast corner is given effect.

Exhibit 14 does not show all the lines referred to by Baker in his testimony, but are shown on this map as made by Baker at the trial in explanation of his survey. His testimony in explanation of his survey, as applied to his "sketch" map or map made, as he said, from the calls of the deeds before he made the survey, in part is as follows: (R. 133)

"(Examination of Witness.)

By the Court:

'From the gear wheel to point E, as I have located it on the ground, the distance is 247 varas, which is about 5 varas in excess of the called distance, if I accept the gear wheel as a corner and run the called distance of 224 yards (242 varas). The distance of 278.3 varas in red on the map is not from the gear shaft to point E but is from the west line, as I have located it. The distance of 278.3 varas is greater than the called distance of 224 yards by 36 varas.'

(Cross Examination Resumed.)

By Counsel for Defendants:

'I have at your request indicated on Exhibit No. 14 a point 224 yards east of where I established the southwest corner of the Rogers tract, which point is 242 vrs. East of point I have established as the southwest corner. At your request I have run a line on the map from said point north 12 degrees east 310 yards. The next call in the partition deed to J. F. Rogers is east 154 yards. That call would go from D as marked by that line to the W. H. Rogers west line.

'From the work done on the ground, it clearly shows there is an excess distance in the north line. If a line is run west from the northeast corner of the J. F. Rogers tract, as I have located it by the iron at the fence, to the northwest corner of the J. F. Rogers 68 1/5-acre tract, as I have located it, there is an excess of about 20 varas. It is therefore evident that, by running the called distance I cannot get back to where I started.'

* * * *

'Beginning at Point B on Exhibit No. 14, the distance west, as I have located the line, is accurate with the call of the partition deed, the distance from Point A on north likewise practically corresponds and the distance on the north is accurate. The distance to Point D, running west, as I have located it, corresponds with the call of 154 yards and the distance from D to E, as I have located the line, corresponds with the called distance. All of the distances on the south line are approximately accurate with the distances in the deeds and 224

yards would approximately put the line at the gear wheel.'

• • • •

The Court:

'What you are getting at is that he admits that the signs of possession, and all the distances called for along the south border are fairly accurate, and commensurate with the calls in the instruments of conveyance, except the last call on the south line to the west?'

Counsel for Defendants:

'Yes. And if you stop at 224 yards, you will be approximately in the old fence line, won't you?

Witness:

A. No, I don't find the old fence—'

The Court:

'What you mean is that if you extend a line north from that point 224 yards west of "E" that a fence extending along that line north will be fairly commensurate with the fence line that you find up there at the north; is that right?'

Counsel for Defendants:

'That is right. The fence he says he found on the South.'

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(Cross Examination Resumed.)

By Counsel for Defendants:

'If you came over 224 yards from "E", you would be close to where the old gear wheel is there?

A. Yes.

Q. And about some distance east of the point you have marked for the southeast corner of the Empire lease?

A. Yes, of the Rogers tract.'

(Examination of Witness.)

By the Court:

'Q. Didn't you testify that you found some evidences of an old fence, not at the point that you established as the southeast corner of that 68-acre tract, not south of the bevel gear, but directly on up north and east of the line that you—

A. I showed two trees there, with wire grown into them.'

The Court:

'Q. How did that point correspond with a line extended from there along to the bevel gear that you found on the ground?

A. Those trees would be some distance west of the bevel gear.'

The Court:

'Q. How must west?

A. It would be an estimate.'

The Court:

'Q. Well, what is your estimate?

A. Probably 15 varas. That is north of the bevel gear.'

The Court:

'Q. That would leave you still approximately 20 varas east of what you have fixed as the southwest corner of the 68-acre tract?

A. Yes.'

Re-Direct Examination

By Counsel for Complainant:

* * * *

"When I started at Point D and ran the calls going the distance, I found no variance until I came to Point E. If from Point E I reversed the call and ran 224 yards west, I would not have been south of the northwest corner of the J. F. Rogers Tract No. 2, as I had located it on the ground. I would have had to go something over 30 varas further west to have been south of the northwest corner of the J. F. Rogers Tract No. 2, as I had established it. In regard to the fence running north, the map shows three trees near the southwest corner of the J. F. Rogers Tract No. 2. I am sure there were parts of a fence north of there on the east side of the road; the fence was crooked and some of it was new and I made no connection to it. I did not find any fence straight across up there and that is the reason I did not connect to it. I did not check the fence, therefore I cannot say where there was any degree of accuracy of a line fence along there. I did find evidence of a fence in the trees as indicated at the southwest corner on the map'." (R. 169.)

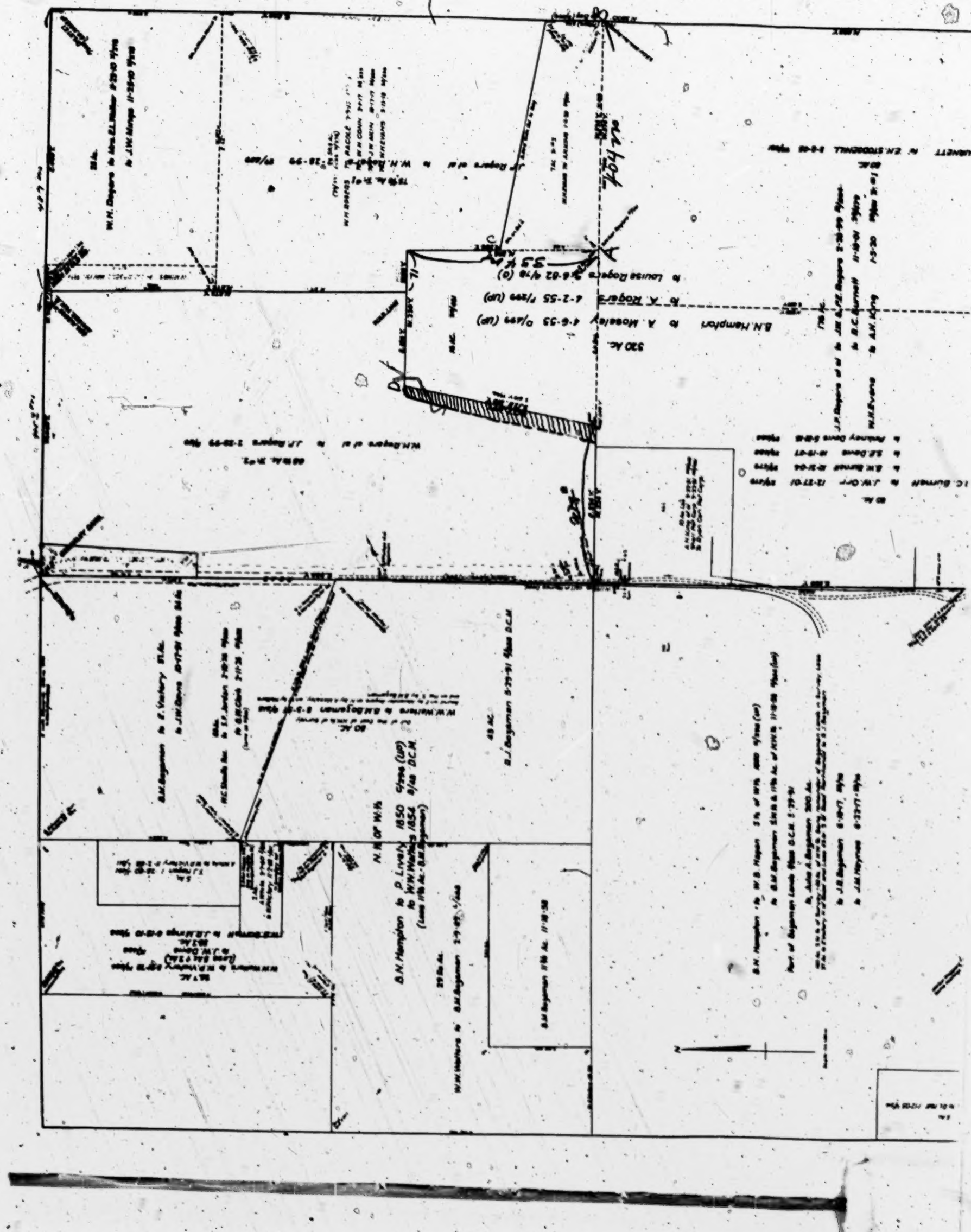
BEN COX, a witness produced by Complainant, having been first duly sworn, testified as follows:

Direct Examination

By Counsel for Complainant:

"My name is H. Ben Cox and I live in Bartlesville, Oklahoma, and am Assistant Superintendent for the Land Department of the Empire Gas & Fuel Company. I have been there two years and before that time I was in Texas and occupied the position of District Land Man in Tyler and Houston. I was in Tyler about three years and Houston about one. I was living in East Texas in 1931. In my capacity as District Land Man I had something to do with the Empire L. J. or F. E. Rogers lease. You have handed me Exhibit No. 18, being the corrected lease from L. J. Rogers and others to the Empire. The original lease was to Chandler.

The company advised me that the description in the original lease was in error, and also excepted a two-acre tract; that the two-acre tract was not excepted by metes and bounds description and that our surveyor had surveyed the tract, which left out the two acres. That we had to secure a ratification lease, or a new lease with a description as worked out by our surveyors."



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